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# MARRYING UP: THE UNSETTLED LAW OF IMMIGRATION MARRIAGE FRAUD AND THE NEED FOR UNIFORM STATUTORY GUIDELINES

MICHAEL VIRGA<sup>†</sup>

## INTRODUCTION

For many Americans, the concept of illegal immigration might conjure stereotypical images of a family wading across the Rio Grande or a student who overstays her visa and then disappears. This sort of immigration law violation might be considered akin to a nation that left its back door open, only to find that someone had snuck inside. However, it may come as a surprise to many in the United States that not all illegal immigration occurs in the shadows. In fact, violators of our immigration laws are often welcomed at America's front door, invited in, and then greeted with open arms—despite their duplicitous intentions. This latter variety of illegal immigration occurs under the cover of fraudulent marriage. In such arrangements, foreigners marry U.S. citizens or permanent legal residents in order to gain preferential immigration treatment and bypass the substantial waiting line for legal entry into America.<sup>1</sup>

The United States has opened itself to this type of in-plain-sight criminality in part through its enduring support for family formation and integrity.<sup>2</sup> It is a stated goal of this nation's lawmakers, in the context of writing our immigration laws, to

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<sup>1</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-259, IMMIGRATION BENEFITS: ADDITIONAL CONTROLS AND A SANCTIONS STRATEGY COULD ENHANCE DHS'S ABILITY TO CONTROL BENEFIT FRAUD 4 (2006).

<sup>2</sup> See *infra* notes 15–24 and accompanying text.

promote the preservation and reunification of family units.<sup>3</sup> This goal is clearly evidenced in our nation's immigration preference system, which affords priority status to those aliens who are relatives or spouses of American citizens or permanent legal residents.<sup>4</sup> However, while this worthwhile goal is indeed functioning to keep many families intact, it nevertheless allows for certain foreign individuals and their domestic enablers to take unfair advantage by breaking the law.<sup>5</sup>

Having become aware of the prevalence of immigration marriage fraud, American lawmakers responded in 1986 by enacting 8 U.S.C. § 1325(c) to combat this practice.<sup>6</sup> This statute, drafted in response to the growing concern over the prevalence of immigration marriage fraud, makes it a federal crime to enter into a marriage for the purpose of evading American immigration laws.<sup>7</sup> Section 1325(c) and several concurrently passed pieces of legislation provided new tools for the federal government's efforts to identify and prosecute this admittedly elusive form of illegal immigration.<sup>8</sup>

However, in the years since its enactment, § 1325(c) has become the subject of divergent statutory interpretation among federal courts, leading to contradictory results that have the potential to seriously undermine federal enforcement efforts.<sup>9</sup> This circuit split turns on a distinction over the intent with

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<sup>3</sup> *Fraudulent Marriage and Fiance Arrangements To Obtain Permanent Resident Immigration Status: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 1 (1985) [hereinafter *1985 Senate Hearing on Immigration Marriage Fraud*] (statement of Sen. Alan K. Simpson, Chairman, Subcomm. on Immigration & Refugee Policy).

<sup>4</sup> See generally 8 U.S.C.A. § 1154 (West 2014) (providing for preferential classification of certain categories of familial relations); see also 8 U.S.C. § 1153(a) (2012) (providing for preferential allocation of visas to family-sponsored immigrants).

<sup>5</sup> See *infra* notes 32–35 and accompanying text.

<sup>6</sup> 8 U.S.C. § 1325(c) (2012). At the time of its enactment, this provision was titled 8 U.S.C. § 1325(b). See *Immigration Marriage Fraud Amendments of 1986*, Pub. L. No. 99-639, § 2(d)(2), 100 Stat. 3537 (1986) (codified as amended at 8 U.S.C. § 1325(c)).

<sup>7</sup> See 8 U.S.C. § 1325(c); *1985 Senate Hearing on Immigration Marriage Fraud*, *supra* note 3, at 90 (statement of Sen. Alan K. Simpson, Chairman, Subcomm. on Immigration & Refugee Policy) (“I appreciate the thoughtful testimony [on increasing immigration marriage fraud]; it was well done. I think there is a need for legislation. We are going to begin to draft that.”).

<sup>8</sup> See *Immigration Marriage Fraud Amendments of 1986* § 2(a), (d)(2).

<sup>9</sup> See *United States v. Ortiz-Mendez*, 634 F.3d 837, 840 (5th Cir. 2011) (collecting cases).

which an allegedly punishable marriage was entered.<sup>10</sup> One group of circuit courts has held that the statute can only be interpreted to punish those who enter a marriage for the sole purpose of evading immigration laws.<sup>11</sup> This so-called “establish a life” test (“Build a Life”) holds that a marriage is not necessarily fraudulent, and therefore not necessarily punishable, if the marriage was entered into with the intent of establishing a joint spousal life—even if gaining immigration preference was an additional motivating factor.<sup>12</sup> The other group of circuit courts has adopted what is known as the “evade the law” test (“Evade the Law”).<sup>13</sup> This competing test holds that a person who has any intent to evade immigration laws when marrying, regardless of any other motivations, is subject to prosecution under the statute.<sup>14</sup>

This Note argues that courts should interpret § 1325(c) as applicable to anyone who enters a marriage with any intent of evading immigration laws, regardless of any other underlying motivations. Part I examines the motivations for and prevalence of immigration marriage fraud, as well as the historical context in which the statute in question was drafted. Part II analyzes the unsettled landscape of § 1325(c)’s interpretation and application, in addition to the competing arguments for the respective tests. Part III argues for the universal adoption of the Evade the Law standard, premised on the need for plain meaning statutory interpretation and the imprudence of creating textually unsupported statutory exceptions. Additionally, this argument details several policy considerations, centered on congressional intent and enforcement challenges, which support the adoption of the Evade the Law standard. Part IV concludes by calling for Supreme Court action on this split or, in the alternative, legislative measures that Congress can undertake to settle this question of statutory interpretation.

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<sup>10</sup> See *id.* at 839–40.

<sup>11</sup> *Id.* at 840.

<sup>12</sup> *United States v. Aksu*, Nos. RDB-12-00668, RDB-12-00669, 2013 WL 1898148, at \*2 (D. Md. May 3, 2013); see also *Ortiz-Mendez*, 634 F.3d at 839–40.

<sup>13</sup> *Aksu*, 2013 WL 1898148, at \*3.

<sup>14</sup> See *id.*

## I. BACKGROUND

A. *Immigration Preference Afforded to Alien Spouses*

The phenomenon of immigration marriage fraud is directly linked to America's immigration preference system.<sup>15</sup> Our nation's immigration laws place a premium on keeping families intact.<sup>16</sup> This goal manifests itself in the form of expedited immigration processing and acceptance of foreign relatives, spouses of American citizens, and permanent legal residents.<sup>17</sup> As a result, qualifying foreign spouses are allowed to bypass immigration quotas and certain procedural hurdles, giving them priority in receiving legal resident status.<sup>18</sup> Additionally, these foreign spouses are afforded preference regardless of other factors that might have normally disqualified the alien for legal permanent admission into the country.<sup>19</sup>

The preferential treatment of alien spouses is hugely significant within the overall American immigration regime. In 2012, over thirty-five percent of those aliens receiving legal permanent resident status did so through the spousal preferences.<sup>20</sup> This group totaled over 370,000 foreign individuals and constituted the largest sub-category of family-sponsored immigrants granted legal permanent resident status in the United States.<sup>21</sup> The vast scale of this preference system, as well as its attractiveness to defrauding aliens, is further underscored by the limited avenues of legal entry to those would-be immigrants without the benefit of spousal or familial ties.<sup>22</sup>

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<sup>15</sup> See *infra* notes 33–35 and accompanying text.

<sup>16</sup> See 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3 (statement of Sen. Alan K. Simpson, Chairman, Subcomm. on Immigration & Refugee Policy) ("Our present immigration laws reserve our very most favored top-drawer status for spouses of American citizens, and the U.S. system, based to a large degree upon the principle of family reunification, certainly there can be no more important reunification than spouses, husband and wife.").

<sup>17</sup> See 8 U.S.C. § 1153(a) (2012) (providing for preferential allocation of visas to family-sponsored immigrants); see also *id.* § 1151(b)(2)(A)(i) (exempting alien immediate family members, including alien spouses, from statutory quotas on immigration visas).

<sup>18</sup> See RANDALL MONGER & JAMES YANKAY, U.S. DEP'T. OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2012, at 1–2 (2013).

<sup>19</sup> See 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3, at 7 (statement of Alan C. Nelson, Comm'r, I.N.S.).

<sup>20</sup> See MONGER & YANKAY, *supra* note 18, at 3.

<sup>21</sup> See *id.*

<sup>22</sup> See *infra* notes 23–24 and accompanying text.

For example, the Diversity Visa Entrant program makes 50,000 permanent resident visas available each year to non-preference foreigners from countries with low immigration rates to the United States.<sup>23</sup> In 2013, nearly *eight million* foreign citizens applied for the program's 50,000 slots.<sup>24</sup>

While American immigration laws confer exceptional benefits to alien spouses, there are still several procedural hurdles designed to prevent fraud and abuse.<sup>25</sup> Alien spouses receive only conditional residency status when they marry a U.S. citizen or a permanent legal resident within two years of their application.<sup>26</sup> After two years of marriage, both the alien spouse and the alien spouse's domestic partner must provide U.S. immigration officials with evidence of the genuineness of their marriage.<sup>27</sup> Furthermore, the spouses are often interviewed separately by immigration officials and questioned on the details of the relationship.<sup>28</sup> Immigration officials examine whether the spouses make inconsistent statements about the details of the marriage, as well as whether the spouses have established bona fide ties such as cohabitation and joint bank accounts.<sup>29</sup> If immigration officials are satisfied that the spouses have not engaged in a fraudulent marriage, the alien spouse's residency status will be changed from conditional to permanent.<sup>30</sup> If not, the alien may be subject to deportation and prosecution, and the domestic spouse may likewise face criminal penalties.<sup>31</sup>

*B. The Great Potential for, and Expansive Reality of, Immigration Marriage Fraud*

There are numerous structural incentives for aliens to enter fraudulent marriages with U.S. citizens or permanent legal residents.<sup>32</sup> First, immigration quotas limit the number of

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<sup>23</sup> Bureau of Consular Affairs, U.S. Dep't. of State, *DV 2013 – Selected Entrants*, U.S. VISAS, [http://travel.state.gov/visa/immigrants/types/types\\_5715.html](http://travel.state.gov/visa/immigrants/types/types_5715.html) (last visited Apr. 23, 2015).

<sup>24</sup> *Id.*

<sup>25</sup> See *infra* notes 26–31 and accompanying text.

<sup>26</sup> See 8 U.S.C.A. § 1186a(a), (h) (West 2013).

<sup>27</sup> See *id.* § 1186a(d).

<sup>28</sup> See *id.* § 1186a(d)(3); see also Nina Bernstein, *Do You Take This Immigrant?*, N.Y. TIMES, June 13, 2010, at MB1.

<sup>29</sup> Bernstein, *supra* note 28.

<sup>30</sup> See 8 U.S.C.A. § 1186a(c)(3)(B).

<sup>31</sup> See *id.* § 1186a(c)(3)(C); see also 8 U.S.C. § 1325(c) (2012).

<sup>32</sup> See *infra* notes 33–35 and accompanying text.

resident visas available to those immigrants without the professional skills or familial ties necessary to qualify for preferential treatment.<sup>33</sup> Second, even for those aliens who do qualify for an immigration preference, there is often a substantial waiting period for admission that can last upwards of several years.<sup>34</sup> Third, there is an extremely limited number of permanent resident visas available relative to the expansive pool of non-preferred foreign applicants.<sup>35</sup> These factors, no doubt, contribute to the attractiveness of fraudulent marriage as a means of gaining expedited entry, or any entry for that matter, into the United States.

Additionally, there are several non-structural factors that exacerbate these systemic incentives toward marriage fraud.<sup>36</sup> For instance, expansive criminal enterprises have become quite adept at facilitating fraudulent marriages between aliens and U.S. citizens or permanent residents for the purpose of gaining immigration preference.<sup>37</sup> Relatedly, there are many low-income U.S. citizens who are willing to enter into a fraudulent marriage in exchange for illicit compensation from the alien spouse.<sup>38</sup> Occasionally, fraudulent marriages are entered into by sympathetic U.S. citizens or permanent legal residents in order to keep an alien acquaintance or significant other in the country.<sup>39</sup> In each of these instances, there is a shadow market that is actively meeting the demands of a community with limited legal immigration options.<sup>40</sup>

The prevalence of immigration marriage fraud is both well documented and unsurprising.<sup>41</sup> U.S. government estimates suggest that upwards of thirty percent of the marriages that

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<sup>33</sup> MONGER & YANKAY, *supra* note 18, at 1.

<sup>34</sup> *See id.* at 2.

<sup>35</sup> *See* Bureau of Consular Affairs, U.S. Dep't. of State, *supra* note 23.

<sup>36</sup> *See infra* notes 37–40 and accompanying text.

<sup>37</sup> 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3, at 13 (statement of Alan C. Nelson, Comm'r, I.N.S.); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1.

<sup>38</sup> 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3, at 16 (statement of Alan C. Nelson, Comm'r, I.N.S.).

<sup>39</sup> *Id.* at 13 ("Many United States citizens and permanent resident aliens will marry because they 'feel sorry' for the alien who is facing deportation . . . or are coerced by parents, lovers, or friends to participate in the shame to facilitate the entry of their friends, relatives, relatives, or business acquaintances.").

<sup>40</sup> *See supra* notes 37–39 and accompanying text.

<sup>41</sup> *See infra* notes 42–44 and accompanying text.

result in aliens receiving resident visas are fraudulently entered into.<sup>42</sup> Additionally, as many as 60,000 of these fraudulent marriages evade detection each year.<sup>43</sup> These statistics are indicative of a trend that has been in force since at least the 1980s.<sup>44</sup>

*C. Legislative Efforts To Combat Immigration Marriage Fraud and Enactment of § 1325(c)*

In the mid-1980s, congressional attention turned to the issue of combatting immigration marriage fraud.<sup>45</sup> Concern was rising during this period over the increasing prevalence of this practice.<sup>46</sup> Estimates by the U.S. Immigration and Naturalization Service (“INS”) determined that, in the early 1980s, as many as thirty percent of all marriages that resulted in immigration preference were the product of fraud.<sup>47</sup> Particularly worrisome to lawmakers was the increasing role played by criminal syndicates in arranging these fraudulent marriages.<sup>48</sup> Additionally, enforcement agencies warned of complicit U.S. citizens or permanent legal residents who were being pressured into expedient marriages by alien friends or lovers.<sup>49</sup>

In testimony provided to the U.S. Senate Subcommittee on Immigration and Refugee Policy in 1985, the Commissioner of the INS at the time, Alan Nelson, called for a series of reforms to help curb the rise of immigration marriage fraud.<sup>50</sup> Nelson asked congressional lawmakers to implement a two-year conditional

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<sup>42</sup> Stephen Kurkjian & Callum Borchers, *A Marriage of a Dream and a Scheme; Holyoke Woman Arranged Dozens of Sham Weddings for Illegal Immigrants*, BOS. GLOBE, Sept. 18, 2011, at 1.

<sup>43</sup> *Id.*

<sup>44</sup> *1985 Senate Hearing on Immigration Marriage Fraud*, *supra* note 3, at 35 (statement of Alan C. Nelson, Comm’r, I.N.S.) (discussing a 1984 survey that estimated that as many as thirty percent of all immigration preference-conferring marriages occurring that year were fraudulent).

<sup>45</sup> *See generally 1985 Senate Hearing on Immigration Marriage Fraud*, *supra* note 3.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 35 (statement of Alan C. Nelson, Comm’r, I.N.S.).

<sup>48</sup> *Id.* at 2 (statement of Sen. Charles E. Grassley, Member, Subcomm. on Immigration & Refugee Policy) (“[M]ore horrendous is the fact that some people are making profit off the business of arranging the subterfuge. I hope that not only will the hearing be a success . . . but I hope that it leads to our ability to bring legislative action to correct this situation which is indeed very serious.”).

<sup>49</sup> *Id.* at 13 (statement of Alan C. Nelson, Comm’r, I.N.S.).

<sup>50</sup> *See id.* at 17–18.



residency status for alien spouses who gained an immigration benefit through marriage, to be followed by a mandatory exit interview that could determine whether the marriage was or was not fraudulent.<sup>51</sup> Additionally, the Commissioner called for "aggressive criminal prosecution"<sup>52</sup> and stated that the burden on the government to prove fraudulent intent "must be eased."<sup>53</sup> Furthermore, Commissioner Nelson argued that the alien's intent at the time of the marriage should "not [be] an ameliorating factor."<sup>54</sup> At the end of the hearing, Subcommittee Chairman Senator Alan Simpson acknowledged the need for legislation to remedy this situation and stated that his Subcommittee would begin drafting it.<sup>55</sup>

A year later, in 1986, Congress responded to calls for reform by passing the Immigration Marriage Fraud Amendments of 1986 ("IMFA").<sup>56</sup> The IMFA was a package of laws enacted to both deter and punish immigration marriage fraud.<sup>57</sup> The legislation included 8 U.S.C. § 1186a, which creates a two-year conditional residency status for aliens who gain immigration preference through marriage to a U.S. citizen or permanent legal resident.<sup>58</sup> The IMFA also enacted § 1325(c), which makes it a crime for anyone to "knowingly enter[] into a marriage for the purpose of evading any provision of the immigration laws."<sup>59</sup> Section 1325(c) imposes a penalty for violation of not more than five years in prison or a fine of not more than \$250,000, or both.<sup>60</sup> Notably, this penalty is applicable to both the alien and the alien's U.S. citizen or permanent legal resident spouse.<sup>61</sup>

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<sup>51</sup> See *id.* at 18–19.

<sup>52</sup> *Id.* at 18.

<sup>53</sup> *Id.* at 19.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 90 (statement of Sen. Alan K. Simpson, Chairman, Subcomm. on Immigration & Refugee Policy).

<sup>56</sup> Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

<sup>57</sup> *Id.* § 2(a), (d).

<sup>58</sup> *Id.* § 2(a) (codified as amended at 8 U.S.C.A. § 1186a (West 2014)).

<sup>59</sup> *Id.* § 2(d)(2) (codified as amended at 8 U.S.C. § 1325(c) (2012)).

<sup>60</sup> 8 U.S.C. § 1325(c).

<sup>61</sup> See *id.*

## II. ANALYSIS OF THE CIRCUIT SPLIT OVER § 1325(c)

Federal circuit courts are split on their interpretation of the language of § 1325(c).<sup>62</sup> While the statute provides that anyone “who knowingly enters into a marriage for the purpose of evading . . . immigration laws” will be subject to punishment,<sup>63</sup> courts have differed on the nature of the intent needed to trigger the law’s prohibitions.<sup>64</sup> These divergent interpretations, which frequently arise in the charging phase of trials,<sup>65</sup> have resulted in two different tests being applied when an individual is prosecuted under the statute: the Build a Life test and the Evade the Law test.<sup>66</sup>

The U.S. Supreme Court has yet to provide any direct guidance on this matter of statutory interpretation. In the one case in which the issue of § 1325(c)’s interpretation was appealed to the Court, certiorari was denied.<sup>67</sup> The only tangentially relevant precedent comes from the 1953 decision of *Lutwak v. United States*,<sup>68</sup> in which the Court adopted a form of the Build a Life test in the context of determining a fraudulent marriage standard as applied to post-World War Two immigrants to the United States.<sup>69</sup> However, this decision is not directly on point given that it examined the interpretation of a different statute than the one at issue in this circuit split.<sup>70</sup> Additionally, § 1325(c) was enacted over three decades after the Court decided *Lutwak*.<sup>71</sup>

### A. *The Build a Life Test*

Under the Build a Life test, a marriage is considered fraudulent, and thereby punishable under the statute, if it was entered into for the sole purpose of evading immigration laws.<sup>72</sup>

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<sup>62</sup> *United States v. Ortiz-Mendez*, 634 F.3d 837, 840 (5th Cir. 2011).

<sup>63</sup> 8 U.S.C. § 1325(c).

<sup>64</sup> *See Ortiz-Mendez*, 634 F.3d at 840.

<sup>65</sup> *See, e.g., id.* at 838–39; *United States v. Darif*, 446 F.3d 701, 709–10 (7th Cir. 2006); *United States v. Islam*, 418 F.3d 1125, 1129–30 (10th Cir. 2005).

<sup>66</sup> *See United States v. Aksu*, Nos. RDB-12-00668, RDB-12-00669, 2013 WL 1898148, at \*2–3 (D. Md., May 3, 2013).

<sup>67</sup> *Darif*, 446 F.3d 701, *cert. denied*, 549 U.S. 1055 (2006).

<sup>68</sup> 344 U.S. 604 (1953).

<sup>69</sup> *See id.* at 611–12.

<sup>70</sup> *See id.* at 611.

<sup>71</sup> *See Immigration Marriage Fraud Amendments of 1986*, Pub. L. No. 99-639, § 2(d)(2), 100 Stat. 3537 (1986) (codified as amended at 8 U.S.C. § 1325(c) (2012)).

<sup>72</sup> *See United States v. Ortiz-Mendez*, 634 F.3d 837, 839–40 (5th Cir. 2011).

Thus, if parties entered the marriage with the intent to build a life together, such as by cohabitating or establishing joint finances, then the marriage will not be a prosecutable "sham," even if the intent to gain improper immigration preference was an additional motivation for entering into the marriage.<sup>73</sup> Consequently, individuals who enter marriages for the purpose of evading immigration laws may nevertheless be able to avoid prosecution under § 1325(c). Circuits that have adopted the Build a Life test include the First, Eighth, and Ninth Circuits.<sup>74</sup>

Courts that have adopted the Build a Life test have cited a variety of rationales for this approach. For instance, in *United States v. Orellana-Blanco*,<sup>75</sup> the Ninth Circuit drew a distinction between what it considered punishable "sham" marriages and marriages that were merely entered, at least in part, to gain immigration preference.<sup>76</sup> The court observed that a spouse's desire to gain immigration preference through marriage does not by itself establish that the marriage was fraudulent or a "sham."<sup>77</sup> The court reasoned that arranged marriages or marriages for money may likewise involve ulterior motives, but, as seen through their prevalence, these ulterior motives do not necessarily render a marriage less than genuine.<sup>78</sup> Accordingly, the Ninth Circuit held that an "intent to obtain something other than or in addition to love and companionship from that life does not make a marriage a sham. Rather, the sham arises from the intent not 'to establish a life together.'"<sup>79</sup>

Other circuits adopting the Build a Life test have looked to the evaluative standards of immigration enforcement agencies in determining whether a marriage is fraudulent and therefore punishable under the statute.<sup>80</sup> For example, in *Cho v. Gonzalez*,<sup>81</sup> the First Circuit looked to the administrative law decisions of the Board of Immigration Appeals ("BIA") for

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<sup>73</sup> See *id.* at 840 (internal quotation marks omitted).

<sup>74</sup> *United States v. Yang*, 603 F.3d 1024, 1026 (8th Cir. 2010); *Cho v. Gonzalez*, 404 F.3d 96, 102–03 (1st Cir. 2005); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002).

<sup>75</sup> 294 F.3d 1143.

<sup>76</sup> *Id.* at 1151.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (quoting *Bark v. I.N.S.*, 511 F.2d 1200, 1201 (9th Cir. 1975)).

<sup>80</sup> See *infra* notes 81–83 and accompanying text.

<sup>81</sup> 404 F.3d 96 (1st Cir. 2005).

guidance in determining whether a marriage was punishable under the statute.<sup>82</sup> In doing so, the court adopted the BIA's rationale that the "relevant legal standard is . . . whether [the defendant] intended to establish a life with her spouse at the time she married him."<sup>83</sup>

*B. The Evade the Law Test*

Under the Evade the Law test, a marriage is considered fraudulent, and therefore punishable under § 1325(c), if the parties entered the marriage with any intent to evade immigration laws.<sup>84</sup> Any concurrent intent or motives for entering the marriage, however seemingly bona fide, are nonetheless irrelevant under this test's analysis.<sup>85</sup> As a result, individuals can be prosecuted under this test even if they entered the marriage with the intent to build a life, provided they also intended to evade immigration laws.<sup>86</sup> Circuits that have adopted the Evade the Law test include the Fourth, Fifth, Sixth, Seventh, and Tenth Circuits.<sup>87</sup>

Courts that have adopted the Evade the Law test have cited a number of rationales, the majority of which focus on a strict, literalist interpretation of the statute's language. For example, in *United States v. Chowdhury*,<sup>88</sup> the Sixth Circuit observed that nothing in the statute's language suggests that an intent to build a life is an element of the provision.<sup>89</sup> Similarly, in *United States v. Ortiz-Mendez*,<sup>90</sup> the Fifth Circuit held that the only intent required by the statute is the intent to evade immigration laws, not the intent to build a life together.<sup>91</sup> Furthermore, the Fifth Circuit stated that § 1325(c) does not prohibit sham marriages, but rather the circumvention of U.S. immigration law.<sup>92</sup>

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<sup>82</sup> See *id.* at 102–03.

<sup>83</sup> *Id.* at 102 (citing *Rodriguez v. I.N.S.*, 204 F.3d 25, 27 (1st Cir. 2000)).

<sup>84</sup> *United States v. Ortiz-Mendez*, 634 F.3d 837, 840 (5th Cir. 2011).

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> *Id.*; *United States v. Darif*, 446 F.3d 701, 710 (7th Cir. 2006); *United States v. Islam*, 418 F.3d 1125, 1129 & n.4 (10th Cir. 2005); *United States v. Chowdhury*, 169 F.3d 402, 407 (6th Cir. 1999).

<sup>88</sup> 169 F.3d 402.

<sup>89</sup> See *id.* at 407.

<sup>90</sup> 634 F.3d 837.

<sup>91</sup> *Id.* at 840.

<sup>92</sup> *Id.*

C. *Divergent Interpretations Threaten To Undermine Enforcement of the Statute*

The conflict between these two competing interpretations of § 1325(c) often arises in the context of charging instructions for a prosecution under the statute.<sup>93</sup> In general, the charging standard for violating the statute is that the government must prove the defendant: "(1) knowingly entered into marriage; (2) knowingly entered into marriage for the purpose of evading any provision of the immigration laws; and (3) knew or had reason to know that her conduct was unlawful."<sup>94</sup> Yet, often in such instances, a defendant will request that the court include the language of the Build a Life test in the charging instructions as well.<sup>95</sup> This supplemental language would likely suggest that defendants can only be found guilty if they did not intend to build a life with their spouses when entering the suspect marriage.

By requesting the inclusion of Build a Life language in charging instructions, defendants are actually requesting the inclusion of a de facto mitigating factor that makes it more difficult to garner a conviction.<sup>96</sup> The Build a Life test is admittedly a more forgiving standard to would-be violators than the Evade the Law test: Under the former, a defendant may indeed have entered into a marriage to evade immigration laws, but may nevertheless avoid prosecution where such evasion was not the only motivating factor.<sup>97</sup> Consequently, a judge who acquiesces to such a request is imposing a more-difficult-to-satisfy, and indeed counterfactual, threshold of intent required for conviction under the statute—that the accused entered the marriage with no other intent than to violate immigration laws. Moreover, the current, and potentially wider, adoption of the Build a Life test stands to greatly undermine federal enforcement efforts under § 1325(c).<sup>98</sup>

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<sup>93</sup> See, e.g., *id.* at 838–39; *United States v. Darif*, 446 F.3d 701, 709–10 (7th Cir. 2006); *Chowdhury*, 169 F.3d at 407.

<sup>94</sup> *United States v. Dimitrova*, 266 F. App'x 486, 490 (7th Cir. 2008) (citing *Darif*, 446 F.3d at 709).

<sup>95</sup> See, e.g., *Ortiz-Mendez*, 634 F.3d at 838–39; *Darif*, 446 F.3d at 709–10; *Chowdhury*, 169 F.3d at 407.

<sup>96</sup> See *supra* Part II.A.

<sup>97</sup> See *supra* Part II.A.

<sup>98</sup> See *infra* Part III.C.

### III. ANALYSIS: THE EVADE THE LAW TEST SHOULD BE UNIFORMLY ADOPTED BY FEDERAL COURTS

#### A. *Plain Meaning Interpretation of § 1325(c) Is Necessary To Devise, and Ultimately Enforce, Congressional Intent*

The circuit split over § 1325(c) turns on divergent interpretations of the statute's language.<sup>99</sup> The pertinent language at issue is: "[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws."<sup>100</sup> Statutory interpretation is a frequently addressed issue by the Supreme Court, and there is no shortage of precedent on the proper approach.

The Supreme Court has consistently held that unambiguous statutes should be interpreted according to their plain and ordinary meaning, unless an "absurd" result occurs.<sup>101</sup> In *Barnhart v. Sigmon Coal Co.*,<sup>102</sup> the Court succinctly summarized this approach:

Our role is to interpret the language of the statute enacted by Congress. . . . "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"<sup>103</sup>

This emphasis on plain meaning interpretation is intended to give maximum deference to the intent of Congress in drafting the statute.<sup>104</sup> And in the case of § 1325(c), the plain and ordinary meaning of the statute's language unequivocally supports the Evade the Law test.

The language of § 1325(c) is not ambiguous. It prohibits the entering of a marriage "for the purpose of evading any provision" of America's immigration laws.<sup>105</sup> This language contains no qualifying requirement that such purpose be the sole reason for

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<sup>99</sup> See *Ortiz-Mendez*, 634 F.3d at 840.

<sup>100</sup> 8 U.S.C. § 1325(c) (2012).

<sup>101</sup> See *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

<sup>102</sup> 534 U.S. 438 (2002).

<sup>103</sup> *Id.* at 461–62 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

<sup>104</sup> *Lamie*, 540 U.S. at 538.

<sup>105</sup> 8 U.S.C. § 1325(c) (2012).

entering the marriage,<sup>106</sup> as is required by the Build a Life test.<sup>107</sup> Indeed, nothing in the statute's language suggests that intent to build a life is even an element of the provision at all.<sup>108</sup> As other courts have observed, the only intent required by the statute's language is the intent to evade immigration law, not the intent to build a life.<sup>109</sup> Moreover, the statute's language includes no reference to "sham" marriages, which is what courts adopting the Build a Life test have found the statute to prohibit.<sup>110</sup> By its plain terms, the statute merely requires that a marriage be entered with any intent whatsoever to evade immigration laws in order to trigger a violation.

Furthermore, an "absurd"<sup>111</sup> result does not occur under the Evade the Law test's interpretation. The consequence of this approach is indeed strict: People who enter a marriage to evade immigration laws, even if as a secondary factor to an otherwise legitimate motivation, will be subject to prosecution.<sup>112</sup> Yet, while this may strike some as being unduly harsh, it is by no means inequitable or absurd. Such an approach simply results in a blanket prohibition against any evasion of U.S. immigration laws. This strict enforcement is in keeping with the fact that Congress and immigration enforcement authorities desired stringent prohibitions against the practice at the time of the statute's enactment.<sup>113</sup> Additionally, this blanket prohibition confirms the rather common-sense notion that one cannot partially break the law when acting in direct contradiction of express statutory guidelines.

Conversely, an "absurd"<sup>114</sup> result does in fact occur under the Build a Life test's interpretation of the statute. This interpretation provides that one can enter into a marriage with the intent to evade immigration laws, but so long as the spouses also intend to and actually do build a life together, they can avoid

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<sup>106</sup> See *id.*

<sup>107</sup> See *United States v. Ortiz-Mendez*, 634 F.3d 837, 840 (5th Cir. 2011).

<sup>108</sup> See *United States v. Chowdhury*, 169 F.3d 402, 407 (6th Cir. 1999).

<sup>109</sup> See *Ortiz-Mendez*, 634 F.3d at 840.

<sup>110</sup> See 8 U.S.C. § 1325(c); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002).

<sup>111</sup> *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

<sup>112</sup> See *Ortiz-Mendez*, 634 F.3d at 840.

<sup>113</sup> See generally 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3.

<sup>114</sup> *Lamie*, 540 U.S. at 534.

conviction under the statute.<sup>115</sup> Thus, the Build a Life test results in people being allowed to act in direct contradiction of § 1325(c)'s prohibition against "knowingly enter[ing] into a marriage for the purpose of evading any provision of the immigration laws."<sup>116</sup> This expansive exception serves to swallow the statute's clearly articulated rule against immigration law evasion, and should rightly qualify as an "absurd"<sup>117</sup> result within the meaning articulated by the Supreme Court.

Some commentators have suggested that the Supreme Court has already addressed the issue of interpreting what constitutes punishable immigration marriage fraud.<sup>118</sup> The main support for this theory comes from the case of *Lutwak v. United States*,<sup>119</sup> a 1953 decision that dealt with interpretation of the War Brides Act and, more specifically, what constituted a punishable fraudulent marriage under that statute.<sup>120</sup> In *Lutwak*, the Court held that punishable "sham" marriages under the War Brides Act were those where the spouses did not intend to build a life in America, but rather married for the sole purpose of gaining immigration preference.<sup>121</sup>

However, the Supreme Court's decision in *Lutwak* does not provide controlling authority on the issue of interpreting § 1325(c), and in fact has been effectively abrogated by the enactment of this later statute.<sup>122</sup> First, the very existence of a circuit split over § 1325(c)'s interpretation establishes that *Lutwak* is clearly not on point.<sup>123</sup> Second, the *Lutwak* decision concerned a statute that is not at issue in this present circuit split—the War Brides Act.<sup>124</sup> Third, Congress enacted § 1325(c) in the wake of *Lutwak*, and its decision to adopt statutory

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<sup>115</sup> See *supra* Part II.A.

<sup>116</sup> 8 U.S.C. § 1325(c) (2012).

<sup>117</sup> See *Lamie*, 540 U.S. at 534.

<sup>118</sup> See Marcel De Armas, Comment, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 743, 748–49 (2007).

<sup>119</sup> 344 U.S. 604 (1953).

<sup>120</sup> *Id.* at 611–12.

<sup>121</sup> See *id.*

<sup>122</sup> See *infra* notes 123–25 and accompanying text.

<sup>123</sup> See *supra* Part II.

<sup>124</sup> *Lutwak*, 344 U.S. at 611.



language that does not mirror that earlier decision suggests that Congress chose to depart from or, at the very least, not embrace this earlier interpretation.<sup>125</sup>

*B. Courts Should Not Create a Build a Life Exception to § 1325(c) Where the Statute Does Not Provide for Such an Exception*

In addition to the need to interpret § 1325(c) according to its plain meaning, this statute must also be construed pursuant to prohibitions against creating exceptions to a statute when its language does not support them. The Supreme Court has offered guidance to this effect, as have leading commentators on statutory construction.<sup>126</sup> As applied to § 1325(c), this principle against concocting unsupported statutory exceptions clearly supports the Evade the Law test's interpretation of the statute.

The principle that courts should not read unarticulated exceptions into a statute is supported by *Sutherland Statutes and Statutory Construction*, a leading treatise on statutory construction.<sup>127</sup> In Sutherland's treatise on statutes and statutory construction, it is observed that every word a legislature excludes from a penal statute should be presumed excluded for a reason.<sup>128</sup> Consequently, courts should not read exceptions, limitations, or conditions into a penal statute's language.<sup>129</sup> As applied to interpreting § 1325(c), this reasoning dictates that the statute should not be construed by federal courts as including excepting language akin to the Build a Life test. The statute makes no provision for the ameliorative effect of a marriage entered into for seemingly genuine reasons despite the intent to evade immigration laws.<sup>130</sup> Rather, the statute

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<sup>125</sup> See 3 NORMAN J. SINGER & J.D. SHAMBLE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 59:8 (Thomson/West 7th ed. Supp. 2013-2014) ("[W]hen a legislature amends a statute following a judicial decision construing the statute, courts presume the legislature amended the statute with that decision in mind.").

<sup>126</sup> See *infra* notes 127-40 and accompanying text.

<sup>127</sup> *Sutherland* is frequently cited approvingly by many federal courts, including the U.S. Supreme Court. See, e.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000) (construing federal bankruptcy code); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311 & n.11 (1994) (construing federal employment discrimination statute).

<sup>128</sup> See SINGER & SINGER, *supra* note 125.

<sup>129</sup> See *id.*

<sup>130</sup> See *supra* Part II.B.

simply states, without any indication to the contrary, that a person need only enter into a marriage with the intent of evading immigration laws to be punished under the statute.<sup>131</sup>

Similarly, the Supreme Court has acknowledged that creating unsupported exceptions to a statutory rule is often ill-advised.<sup>132</sup> For instance, in *Barnhart v. Sigmon Coal Co.*, the Court found it inappropriate to alter statutory text in order to satisfy the policy preferences of interpretive bodies.<sup>133</sup> The Court added that these are “battles that should be fought among the political branches” and that “parties should not seek to amend the statute by appeal to the Judicial Branch.”<sup>134</sup> In the case of prosecutions under § 1325(c), many defendants are apparently and essentially asking courts to do just that: adopt the statutorily unsupported language of the Build a Life test as a de facto statutory provision.<sup>135</sup> Accordingly, courts should be hesitant to amend the statute’s language at the request of litigants and in lieu of legislative clarification of the matter.

Furthermore, the Supreme Court has held that the presence of exceptions in a statute means that courts should not read in other exceptions elsewhere in the statute.<sup>136</sup> For example, in *United States v. Johnson*,<sup>137</sup> the Court held that when “Congress provides exceptions in a statute, it does not follow that courts have authority to create others.”<sup>138</sup> The Court went on to state that the proper inference is that Congress considered creating such exceptions in the course of drafting the statute.<sup>139</sup> Any subsequent absence of further exceptions, the Court reasoned, makes it logical to infer that Congress intentionally limited the exceptions to those set forth expressly in the statute.<sup>140</sup>

This principle should apply to the interpretation of § 1325(c), given that the legislative package that created this provision also concurrently created a key ameliorative exception in a related

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<sup>131</sup> 8 U.S.C. § 1325(c) (2012).

<sup>132</sup> See *infra* notes 133–35 and accompanying text.

<sup>133</sup> *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002).

<sup>134</sup> *Id.* at 462.

<sup>135</sup> See *supra* Part III.A.

<sup>136</sup> See *infra* notes 137–40 and accompanying text.

<sup>137</sup> 529 U.S. 53 (2000).

<sup>138</sup> *Id.* at 58.

<sup>139</sup> *Id.*

<sup>140</sup> See *id.*

anti-marriage fraud statute.<sup>141</sup> Among its several components, the Immigration Marriage Fraud Act of 1986 included 8 U.S.C. § 1186a,<sup>142</sup> which created a two-year conditional residency status for those aliens who married a U.S. citizen or permanent legal resident within two years of their visa expiring.<sup>143</sup> Additionally, this companion statute requires that the spouses in such marriages undergo exit interviews with immigration officials to be further screened for fraud.<sup>144</sup> The rationale behind this companion statute was that it would help deter immigration marriage fraud by imposing additional oversight of would-be fraudulent spouses.<sup>145</sup> However, this substantial anti-fraud measure also includes a very significant exception in the form of a hardship waiver.<sup>146</sup> The statute gives authority to the Attorney General to waive this two-year conditional residency requirement for selected alien spouses who gained immigration preference through marriage.<sup>147</sup> Given that Congress expressly created this exception to the immigration marriage fraud regime created by the IMFA, it stands to reason that Congress likewise made the deliberate decision not to include a Build a Life-like exception in drafting § 1325(c).

*C. Policy Considerations Caution Against Adoption of the Build a Life Test*

While the plain meaning and express language interpretation of § 1325(c) alone supports adoption of the Evade the Law test, several key policy considerations also advance this position. More specifically, and indeed somewhat counterfactually, the negative policy implications of adopting the competing Build a Life test bolsters the prudence of the Evade the Law approach. These policy considerations stem from the fact that immigration marriage fraud has increasingly taken place under the auspices of large-scale, sophisticated, and highly

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<sup>141</sup> See *infra* notes 142–47 and accompanying text.

<sup>142</sup> Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(a), 100 Stat. 3537 (1986).

<sup>143</sup> 8 U.S.C.A. § 1186a(a), (c) (West 2014).

<sup>144</sup> *Id.*

<sup>145</sup> See 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3, at 18–19 (statement of Alan C. Nelson, Comm'r, I.N.S.) (discussing the deterrence potential of a two-year conditional waiting period).

<sup>146</sup> 8 U.S.C.A. § 1186a(c)(4).

<sup>147</sup> *Id.*

organized criminal enterprises that are already adept at exploiting weaknesses within the current immigration enforcement regime.<sup>148</sup>

Criminal syndicates perpetrate a great deal of immigration marriage fraud in the United States.<sup>149</sup> Countless official reports and news articles have profiled the prevalence of immigration marriage fraud networks through the nation.<sup>150</sup> These syndicates operate in jurisdictions ranging from California to Connecticut.<sup>151</sup> They function by arranging for the marriage of an alien to a U.S. citizen or permanent legal resident in exchange for often considerable sums of money, both to the domestic enabler and to the criminal matchmaker.<sup>152</sup> Government oversight agencies have likewise observed the vast scale of these fraud networks.<sup>153</sup> A recent Government Accountability Office report detailed how, in just one marriage fraud ring, forty-four individuals were indicted in a decade-long scheme that obtained fraudulent visas for hundreds of foreign nationals.<sup>154</sup> Likewise, a number of recent prosecutions for immigration marriage fraud under § 1325(c) have featured defendants who were participants in these illicit matchmaking syndicates.<sup>155</sup>

These criminal syndicates are also very sophisticated networks of organized crime, both in terms of the parties involved and the tactics employed.<sup>156</sup> Immigration marriage fraud syndicates have been perpetrated by such diverse parties as members of the Mafia<sup>157</sup> to members of the bar.<sup>158</sup>

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<sup>148</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 13–15, 17.

<sup>149</sup> See *infra* notes 150–55 and accompanying text.

<sup>150</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 13–15; Kurkjian & Borchers, *supra* note 42.

<sup>151</sup> See, e.g., Cathy Locke, *Immigration Consultant Pleads Guilty in Marriage Fraud Scheme*, SACRAMENTO BEE (Mar. 7, 2013), <http://blogs.sacbee.com/crime/archives/2013/03/immigration-consultant-pleads-guilty-in-marriage-fraud-scheme.html>; *Moroccan Man Sentenced for Marriage Fraud*, CONN. POST, (Jan. 12, 2012, 10:46 AM), <http://www.ctpost.com/default/article/Moroccan-man-sentenced-for-marriage-fraud-2489579.php>.

<sup>152</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1.

<sup>153</sup> *Id.* at 13.

<sup>154</sup> *Id.*

<sup>155</sup> See, e.g., *United States v. Darif*, 446 F.3d 701, 703–04 (7th Cir. 2006); *United States v. Islam*, 418 F.3d 1125, 1127 (10th Cir. 2005); *United States v. Tagalicud*, 84 F.3d 1180, 1182 (9th Cir. 1996).

<sup>156</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, 13–15, at 17.

<sup>157</sup> Al Baker, *Mafia Is Accused of Immigration Fraud To Lure Strippers*, CITY ROOM (Nov. 30, 2011, 4:46 PM), [http://cityroom.blogs.nytimes.com/2011/11/30/mafia-is-accused-of-immigration-fraud-to-lure-strippers/?\\_r=0](http://cityroom.blogs.nytimes.com/2011/11/30/mafia-is-accused-of-immigration-fraud-to-lure-strippers/?_r=0).

Furthermore, these syndicates employ complex strategies to ensure that the illicit spouses avoid detection.<sup>159</sup> Frequently, they will brief fraudulent spouses on the screening methods of immigration authorities and the steps that they can take to avoid subsequent detection.<sup>160</sup> For instance, criminal matchmakers will often instruct fraudulent spouses to exchange apartment keys or to establish joint bank accounts, which in turn can then be shown to immigration officials as fabricated proof of a bona fide marriage.<sup>161</sup>

Congress was made aware of the role played by immigration marriage fraud syndicates when it enacted § 1325(c).<sup>162</sup> In testimony before the Senate Subcommittee on Immigration in 1985, the Commissioner of the INS at the time, Alan Nelson, explained the expansive prevalence and fraudulent creativity of immigration marriage fraud syndicates in promoting this illicit enterprise.<sup>163</sup> Commissioner Nelson observed that marriage fraud syndicates constituted a “thriving cottage industry in the underground economy.”<sup>164</sup> He went on to explain to lawmakers:

While marriage can be arranged for free, many cost in the realm of \$3,000 to \$5,000. Some aliens have paid as much as \$20,000 for marriage packages that include attorney services.

....

Numerous underground businesses, which cater to matching the demand of aliens for cooperative “spouses” with the supply of individuals willing to make an easy dollar, strive to establish foolproof ways of foiling Service detection efforts. Some of these businesses spring into life at the command of the most legitimate of institutions; others are unrelated to immigration law as beauty parlors and donut shops. What they have in

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<sup>158</sup> Van Smith, *Maryland Immigration Attorney Pleads Guilty to Sham-Marriage Conspiracy*, BALT. CITY PAPER (Jan. 11, 2012), <https://web.archive.org/web/20130925170113/http://citypaper.com/news/maryland-immigration-attorney-pleads-guilty-to-sham-marriage-conspiracy-1.1255644>.

<sup>159</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 13.

<sup>160</sup> See 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3, at 13 (statement of Alan C. Nelson, Comm'r, I.N.S.).

<sup>161</sup> *Id.*

<sup>162</sup> See *infra* notes 163–67 and accompanying text.

<sup>163</sup> See 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3, at 13 (statement of Alan C. Nelson, Comm'r, I.N.S.).

<sup>164</sup> *Id.* at 17.

common are individuals who put the alien in touch with a willing marital partner who, for a fee, will marry the alien and petition for his immigration.<sup>165</sup>

Following this briefing on marriage fraud syndicates, then-Chairman, Senator Alan Simpson, acknowledged the need to implement legislative reforms to combat this practice.<sup>166</sup> And one year later, in 1986, Congress passed such an anti-fraud measure in the form of § 1325(c).<sup>167</sup>

Today, the Build a Life test ostensibly creates a loophole in § 1325(c) that allows individuals to violate the statute as written. The Build a Life test provides that individuals can only be convicted under the statute if their sole motivation for entering the marriage was to evade immigration laws.<sup>168</sup> This interpretation means that individuals may be able to escape conviction by proffering evidence that, even though they married to evade immigration laws, they nevertheless entered into the marriage with bona fide intentions of building a joint spousal life.<sup>169</sup>

Allowing for such a loophole may provide an opening for adept immigration marriage fraud syndicates to better perpetrate this criminal enterprise. Organized crime syndicates have previously proven effective at exploiting legal loopholes to further their illicit goals.<sup>170</sup> This phenomenon is particularly visible in the context of illegal transfers of firearms. For instance, a loophole in federal gun laws allows for felons, who are otherwise prohibited from owning firearms, to avoid requisite background checks and to legally acquire a firearm by acquiring

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<sup>165</sup> *Id.* at 13–14.

<sup>166</sup> *Id.* at 90 (statement of Sen. Alan K. Simpson, Chairman, Subcomm. on Immigration & Refugee Policy).

<sup>167</sup> Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d)(2), 100 Stat. 3537 (1986).

<sup>168</sup> *See United States v. Ortiz-Mendez*, 634 F.3d 837, 840 (5th Cir. 2011).

<sup>169</sup> *See supra* Part II.A.

<sup>170</sup> *See, e.g., William Booth & Anne-Marie O'Connor, Mexican Cartels Emerge as Top Source for U.S. Meth*, WASH. POST, Nov. 28, 2010, at A01 (discussing Mexican drug cartels' exploitation of loopholes in regulation of global pharmaceutical trade to seemingly legally, yet illicitly, acquire raw materials for drug production); Brian Bandell, *Cash, Condos & Criminals: The Big Loophole for Money Laundering*, S. FLA. BUS. J. (Sept. 3, 2013), <http://www.bizjournals.com/southflorida/print-edition/2013/08/30/lcs-offer-secrecy-to-foreign-criminal.html> (reporting on the use of limited liability corporations and their opaque ownership structure to launder illicit drug cartel funds through United States real estate holdings).

a weapon through and registering the weapon with a trust.<sup>171</sup> Similarly, felons can acquire a firearm in contradiction of federal law by virtue of the much publicized “gun-show loophole,” whereby an otherwise legal buyer can acquire the weapon and then sell it to a felon in an unregulated, secondary purchase.<sup>172</sup> In each of these instances, individuals or organizations engaging in a criminal enterprise can and do exploit legal loopholes in order to further their illicit commercial aims through erstwhile legal means.

Thus, with a broader adoption of the Build a Life loophole, it stands to reason that marriage fraud syndicates could adopt measures to exploit this loophole and perpetrate more sophisticated marriage fraud. In what would amount to an almost belt-and-suspenders approach to coaching fraudulent spouses on evading immigration enforcement, these syndicates could foreseeably guide these spouses on how to avoid detection and, even if they are detected, avoid conviction altogether. These syndicates could create a pretext of legitimate marriage both for the exit interview screening phase, as well as for any subsequent prosecution for immigration marriage fraud under § 1325(c), by encouraging spouses to take several common-sense procedures that tend to prove the spouses intended to build a life together. For instance, marriage fraud syndicates may encourage fraudulent spouses to establish longer courtships to build the impression of genuine romance and relationship formation. Additionally, they may suggest that the alien spouses adopt a more subtle, alternative payment system to compensate their domestic enabler in order to conceal illicit transfers; such payments might take the form of lavish gifts made to a U.S. citizen or permanent legal resident spouse that are ostensible cash transfers hidden in the guise of spousal affection. These measures could then be offered in the event of a prosecution for § 1325(c) as strong evidence of the spouses’ intentions to build a life together.

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<sup>171</sup> Erica Goode, *Trusts Offer a Legal Loophole for Guns with Limits*, N.Y. TIMES, Feb. 26, 2013, at A12. This gun trust loophole has since been closed by executive action of the Obama Administration. Juliet Eilperin, *White House To Close 2 Gun-Sales Loopholes*, WASH. POST, Aug. 30, 2013, at A02.

<sup>172</sup> See Reed Williams, *Law Enforcement Officials Back Closing the ‘Gun-Show Loophole,’* RICHMOND TIMES-DISPATCH, June 27, 2012 (internal quotation marks omitted).

The potential for criminal syndicates to exploit the Build a Life test's loophole strongly supports universal adoption of the Evade the Law test. The Evade the Law test does not provide any mitigating exemption for those spouses who marry both to circumvent immigration laws and to build a joint spousal life.<sup>173</sup> This test's only inquiry is whether there was any intent to evade immigration laws when the marriage was entered into.<sup>174</sup> This narrower inquiry sidesteps an evaluation of other, seemingly genuine motivations for entering the marriage.<sup>175</sup> As a result, any pretexts of legitimacy coached by marriage fraud syndicates will have much less bearing on the ultimate decision of whether or not to convict under § 1325(c).

Additionally, § 1325(c)'s policy role as a general deterrent to immigration marriage fraud further supports the adoption of the Evade the Law test. This statute was passed in response to calls by immigration enforcement authorities for stronger prosecutorial tools to combat immigration marriage fraud.<sup>176</sup> Former INS Commissioner Alan Nelson testified before Congress prior to the statute's passage that "[o]nly aggressive criminal prosecution can serve to deter this crime."<sup>177</sup> Commissioner Nelson further requested that statutory guidelines be clarified so that "the alien's intent at the time of the marriage is not an ameliorating factor."<sup>178</sup> In the wake of these calls for reform, Congress passed § 1325(c).<sup>179</sup> Furthermore, several leading policy research organizations have identified a link between enhanced immigration enforcement and effective deterrence of illegal immigration.<sup>180</sup> Accordingly, deference to a strict

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<sup>173</sup> See *supra* Part II.B.

<sup>174</sup> See *supra* Part II.B.

<sup>175</sup> See *supra* Part II.B.

<sup>176</sup> 1985 Senate Hearing on Immigration Marriage Fraud, *supra* note 3, at 18 (statement of Alan C. Nelson, Comm'r, I.N.S.); see also *id.* at 90 (statement of Sen. Alan K. Simpson, Chairman, Subcomm. on Immigration & Refugee Policy) ("I appreciate the thoughtful testimony; it was well done. I think there is a need for legislation. We are going to begin to draft that.").

<sup>177</sup> *Id.* at 18 (statement of Alan C. Nelson, Comm'r, INS).

<sup>178</sup> *Id.* at 19.

<sup>179</sup> Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d)(2), 100 Stat. 3537 (1986).

<sup>180</sup> For a broader discussion of the potential policy benefits of stricter immigration enforcement, see generally BRYAN ROBERTS ET AL., COUNCIL ON FOREIGN RELATIONS, MANAGING ILLEGAL IMMIGRATION TO THE UNITED STATES: HOW EFFECTIVE IS ENFORCEMENT? (2013), available at <http://www.cfr.org/immigration/managing-illegal-immigration-united-states/p30658>; JESSICA M.



interpretation of the statute that accounts for no mitigating factor, as embodied by the Evade the Law test, is most in keeping with the deterrence policy goals articulated to and by Congress.

Finally, Congress should also use the opportunity of any forthcoming comprehensive immigration reform effort to amend § 1325 and settle this issue of statutory construction. Momentum has been growing in recent years for a major overhaul of America's immigration regime and enforcement efforts.<sup>181</sup> Yet, in 2013, of the two main reform bills introduced in the U.S. House of Representative and Senate, respectively, neither make any attempt to provide clarity on the issue of § 1325(c)'s interpretation.<sup>182</sup> Given the polarizing debate surrounding and indeed imperiling many recent efforts to reform American immigration laws,<sup>183</sup> Congress should not pass at what may ultimately be one of the few opportunities to make contentious yet substantive and much needed amendments to this statute.

Moreover, the prospect of partial or full amnesty being included in a comprehensive immigration reform package only adds to the need for congressional clarification of § 1325(c). Such an amnesty provision has become increasingly debated in recent years.<sup>184</sup> Yet it seems that the underlying principle of amnesty is that it is a one-time absolution of illegality, and not an abandonment of our continuing duty to secure our borders. Additionally, amnesty would result in our society incorporating far more foreign individuals than policymakers have to date authorized. The prospect of this massive influx in turn requires

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VAUGHAN, CTR. FOR IMMIGRATION STUDIES, ATTRITION THROUGH ENFORCEMENT: A COST-EFFECTIVE STRATEGY TO SHRINK THE ILLEGAL POPULATION (2006), available at <http://www.cis.org/Enforcement-IllegalPopulation>.

<sup>181</sup> Jennifer S. Korn, *New Momentum for Immigration Reform, with Conservatives Leading the Way*, FOX NEWS LATINO (Mar. 4, 2013), <http://latino.foxnews.com/latino/opinion/2013/03/04/new-momentum-for-immigration-reform-with-conservatives-leading-way/>.

<sup>182</sup> See generally H.R. 2278, 113th Cong. § 1 (2013); S. 744, 113th Cong. § 1 (2013).

<sup>183</sup> Ezra Klein, *How Immigration Reform Is Scrambling American Politics*, WASH. POST (Mar. 30, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/30/how-immigration-reform-is-scrambling-american-politics/>.

<sup>184</sup> Cindy Chang, *In a New Era, Another Try at Amnesty; in 1986, a Path Toward U.S. Citizenship Was Offered to 3 Million. Now Such a Step Would Come in a Much Different Climate*, L.A. TIMES, May 13, 2013, at A1.

that our nation redouble its efforts at immigration control, lest our efforts to incorporate those granted amnesty be overwhelmed.

### CONCLUSION

The Evade the Law test represents a proper interpretation of § 1325(c) in keeping with both canons of statutory construction and Supreme Court authority. This test follows the plain meaning of the statute's unambiguous language,<sup>185</sup> and refuses to create a textually unsupported exception to the statute's prohibitions.<sup>186</sup> This test is also most effective at promoting the policy goals articulated at the statute's inception. It is less susceptible to ameliorative pretexts of marital legitimacy and the marriage fraud syndicates who would promote them.<sup>187</sup> Moreover, it is a strict standard that provides credible deterrence of marriage fraud and does not allow a fraudulent spouse's intent to become a mitigating factor.<sup>188</sup> As a result, it is reasonable to infer that the Evade the Law test most closely evinces the intent of Congress in enacting § 1325(c) and should be universally adopted.

Given that § 1325(c) is the subject of divergent statutory interpretation among the circuits,<sup>189</sup> the Supreme Court should hold that the Evade the Law test is the proper interpretive standard. The Court has yet to address this issue of interpretation, having denied certiorari in the one case in which it was sought.<sup>190</sup> Accordingly, the Court should grant the next petition on the issue of § 1325(c) and put a definitive end to this debate in favor of the Evade the Law test.

Alternatively, this issue of statutory interpretation can and indeed should be addressed by our nation's lawmakers. Congress should amend § 1325 to provide additional, concrete guidance on the issue of what constitutes punishable immigration marriage fraud under the statute. Congress can do so by adding an express definition of punishable fraudulent marriage, given that

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<sup>185</sup> See *supra* Part III.A.

<sup>186</sup> See *supra* Part III.B.

<sup>187</sup> See *supra* Part III.C.

<sup>188</sup> See *supra* Part III.C.

<sup>189</sup> See *supra* Part II.

<sup>190</sup> *United States v. Darif*, 446 F.3d 701 (7th Cir. 2006), *cert. denied*, 549 U.S. 1055 (2006).

the statute currently does not feature any such classification.<sup>191</sup> Furthermore, Congress can provide guidance by amending the statute's language to state that secondary motivations for entering a marriage, however genuine, are not grounds to avoid conviction under the statute.

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<sup>191</sup> See 8 U.S.C. § 1325(c) (2012).